THE
AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Published Monthly for the Department of Law by PAUL D. I. MAIER, at 115 South Sixth Street, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the TREASURER.

CUSTOM IN RELATION TO CONTRACTS; PAYMENT OF MONEY UNDER MISTAKE OF LAW, RELIEVED IN EQUITY. The very recent case of *Gas Co.* v. *Gaines*, 49 S. W. 462, decided February 9, 1899, in the Court of Appeals of Kentucky, is the culmination of a series of decisions in that state concerning the right of one paying under mistake of law to recover in equity. The facts were as follows: Appellant company succeeded to the control of the gas plant in the city of Frankfort. In the contract giving them control was the following clause, "And the second party or its assigns are, and hereby agree and bind themselves to supply consumers of gas at the rate of not exceeding $2.00 per 1000 cubic feet . . . to supply the said city and the private consumers with a good quality, and

keep the said works in constant operation, reasonable time for repairs, and unavoidable accidents excepted." The company charged Gaines 25 cents per month meter rent, claiming a right to do so, as the city, which was previously in charge, had made a similar exaction. The court held that no meter rent could be charged, as it could in nowise be inferred from the contract that the company was meant to have this right: Following *Gas Co.* v. *Dulaney*, 38 S. W. 703. The further question then arose, should the company repay to Gaines the meter rent which he had paid them for five years under mistake as to his legal obligation? Held, that the company was bound to repay.

The earliest Kentucky case dealing with a question of this kind—and which, significantly enough, is not cited in the case under discussion—is *Underwood* v. *Brockman*, 4 Dana, 310, decided in 1836. The bill in this case was brought to set aside a written instrument made by a very old man. In concluding the opinion it was said, "Whether, therefore, the compromise is evidence of fraud, *or* surprise *or* imbecility, *or* whether there was an evident mistake of plain law, and was, therefore, nothing fit for a compromise, is not material; for it seems clear to us, that *some one or all* of these several hypotheses should be admitted to be true; and *if any one* of them be so, the decree for a re-conveyance of the land was not unjust or erroneous." Notwithstanding this ambiguous decision the next case on the point—*Ray* v. *Bank*, 3 Ben. Mon. 510 (1843)—and one on which the court relied on in *Gas Co.* v. *Gaines*, assumes it as authority for the principle enunciated in the latter case. Later cases affirming the view are *Covington* v. *Powell*, 2 Metc. (Ky.) 228 (1859); *Louisville* v. *Henning*, 1 Bush, 381 (1866); *McMurtry* v. *R. R. Co.*, 84 Ky. 462, 1 S. W. 815 (1886); *L. & N. R. R.* v. *Hopkins*, 87 Ky. 613 (1888); *Gas Co.* v. *Dulaney*, 38 S. W. 703 (1897). It is true that in one portion of the opinion in *Underwood* v. *Brockman*, 4 Dana, 318, it is said, "But when it can be made *perfectly evident*, that the *only* consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no *fair compromise of bona fide* and *doubtful* claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality." But this, taken in connection with the *ratio decidendi* quoted above, is a very flimsy foundation for such an important doctrine, and should be viewed as a mere dictum.

Perhaps no maxim of the law is more familiar or of more general application than, "*Ignorantia legis non excusat:*" *Manser's Case*, 2 Coke, 3 b. This is a doctrine of the civil law as well and further has the practically unanimous weight of modern authority to sustain it: See Bispham, Equity, § 187, *et seq.* In the leading case of *Bilbie* v. *Lumley*, 2 East, 469 (1802), Ellenborough, L.C.J., said, "Every man must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."

It applies to special as well as general rules of law, to civil as well as criminal law: Pomeroy, Equity, § 841, *et seq.* "It is settled at law and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, *but with full knowledge of all the circumstances*, cannot be recovered back:" Ib. and authorities there cited. "Generally money paid under mistake of law cannot be recovered, although it is against conscience for the defendant to retain it:" Keener, Quasi Contracts, p. 85 and authorities there cited.

The decision of the court in *Gas Co.* v. *Gaines* is not only contrary to the overwhelming majority of cases, but the line of cases which it follows is founded upon a mere dictum. The court seems to have deliberately made a rule which it has followed ever since.

PROPERTY RIGHTS OF AN AUTHOR IN HIS OWN MANUSCRIPT. *New Jersey State Dental Society* v. *Denticura Co.* (Court of Chancery of New Jersey, 1898), 41 Atl. 672. At an annual meeting of the New Jersey State Dental Society, a committee of the society read a report in the nature of an original essay on the care and preservation of the teeth, several passages of which commended the tooth paste "Denticura" manufactured by the defendant. The society accepted the report and put it on file for discussion later. After the meeting the defendant secretly procured a copy of the report and proceeded to use the commendatory passages as an advertisement of his tooth paste "Denticura." Thereupon the society filed a bill praying that the defendant be restrained from publishing the above mentioned extracts. It appeared that many members of the outside public—not members of the society—were present at the meeting. On these facts the Vice-Chancellor granted the injunction, holding that the defendant had failed to prove a dedication of the report to the public by the society, and that the entire property in the report remained, therefore, in the society.

What constitutes such a publication by an author of his work as conveys a title in that work to the public and thereby deprives the author of the exclusive right to the use of the work, is a question of some interest.

It is clear that the publication *in print* of a work of which no copyright has been obtained, is a complete dedication to the public for all purposes. But in the case of unprinted works published before a number of people—a play produced on the stage, a lecture read by a University professor to his students, a sermon delivered from the pulpit—the question, what in such cases amounts to a complete dedication, is never difficult.

The general test to be applied in such cases appears to be that laid down by Lord Chancellor Halsbury in *Caird* v. *Sime*, 12 App. Cas. 326 (1887). There the question was whether, in the case of lectures orally delivered in the University of Glasgow to students of the University, there was a dedication to the public. The court said it must be decided "by the nature of the thing, from the

circumstances of its delivery and the object with which it was delivered." They held that these lectures, having been delivered to a very limited number of persons, for the sole purpose of instructing those present, had not been dedicated to the public. Lord Fitzgerald dissented on the ground that a professor in a publicly endowed University of Scotland "spoke for the University," and that his obligation was "to teach the nation through its youth." The majority declined to accept this view of the status of a University professor, but admitted that if it was correct, then there had been a dedication to the public, even though the class room was open only to those who paid the required fee and complied with the other requirements. This point is interesting as showing that the House of Lords did not regard the payment of a fee by the student as conclusive against the idea of publication. They based their judgment on the nature of the position of a University professor. There seems to be a tendency in some recent cases to regard the payment or non-payment of an admission fee as the sole test as to the dedication of a literary production to the public. This, it is submitted, is incorrect both on principle and authority.

Whether a student has the right to take a stenographic report of a professor's lecture and then sell copies of it to the other students of the class, a practice common in many law schools in this country, is apparently undecided. The student certainly has no right to sell such copies to members of the outside public, and under the test laid down in *Caird* v. *Sime* it is, at least, arguable whether he may even sell them to other students, especially if it is done in the face of a declaration by the Faculty of the institution that such a sale of reports of lectures to students is opposed to the objects for which the lectures are delivered.

CRIMINAL LAW; NUISANCE; POLLUTION OF A STREAM SUPPLYING PUBLIC WATERWORKS. The case of *Commonwealth* v. *Yost*, 10 Pa. Super. Ct., decided July, 1899, is interesting, not only because it concerns the pollution of a public water supply—a question which has recently attracted much attention—but also because it throws additional light upon the line of distinction which marks off the case of *The Coal Company* v. *Sanderson*, 113 Pa. 126, from the other cases involving the question of riparian rights.

In *Comwonwealth* v. *Yost*, the Superior Court reverses the opinion of the Quarter Sessions Court and orders a re-trial of the case. The defendant was indicted for maintaining a nuisance in that he allowed the sewage to flow from his premises into one of the tributaries of a creek from which water is supplied to the City of York at a point twelve miles below. The Commonwealth proved that disease germs could be carried that distance, and that there was serious danger of a contamination of the water supply of York. Defenses were made alleging, in the first place, that the Local Board of Health had declared the stream in question a public sewer, and that the defendant was, therefore, forced to drain into

it; and, secondly, that the defendant had a prescriptive right to pollute the stream. The court below submitted to the jury the question of whether or not, as a matter of fact, this stream was a public sewer. The evidence tending to show that it was consisted in the proof that houses had been erected on the stream, that a highway bridge had been built across it and that, on one occasion, the borough street commissioner had removed some flood debris. In the Superior Court, Orlady, J., after referring to the fact that a watercourse does not lose any of its characteristics merely because houses are built on it, said: "There cannot be a public or common sewer that has not been constructed and maintained by a municipality, and that is not subject to municipal control." The rule here laid down is important because it renders futile the defense attempted in all such cases that because pollution has occured in a stream within a municipality, the watercourse forthwith becomes a public sewer, and those having riparian rights below have no remedy against such pollution.

The evidence relating to the second defense showed that the borough had grown up from a few houses which were adjacent to the stream. But the Judge says: "No prescription or usage can justify the pollution of a stream by the discharge of sewage in such a manner as to be injurious to the public health. Lapse of time will not legalize a public nuisance. To deposit in a natural watercourse in close proximity to a source of supply from which the water is used for domestic purposes, the noisome and offensive matter described in the uncontradicted evidence in this case is a public nuisance, and it should have been so declared by the court." This is a restatement, but in stronger terms, of the rule laid down in *McCallum* v. *The Water Company*, 54 Pa. 40, decided in 1867. The Water Company was granted a perpetual injunction restraining McCallum from polluting their water supply. For a number or years McCallum had allowed the waste from his carpet mills to drain into the stream, but the impurities had been of a sort which could be easily removed at the waterworks. But in 1861 the manufacturing of blankets, which he then undertook, produced waste products which rendered the water in the stream totally unfit for use. McCallum set up a prescriptive right to pollute the water. Read, J., in affirming the judgment of the lower court, said: "Such a prescription to render running water unfit for drinking and domestic purposes by a riparian proprietor below you, requires the strictest proof of its existence." "If, therefore, an upper riparian proprietor claims the right to pollute the stream by prescription . . . he cannot pollute the water to any greater extent" than he did at the commencement of the prescriptive period. Here it will be noticed, it is not denied, as it is in the principal case, that a prescriptive right to pollute a stream may exist.

In an English case decided about the same time, *Goldsmid* v. *The Commissioners*, 12 Jurist N. S. 308, the Court of Appeal con-

sidered the question of a prescriptive right to pollute, though the case was decided on other grounds. But on this point, Sir G. J. Turner, L. J., says: "I assume, but without meaning to give any opinion upon the point, that such a right might well be acquired; but I think it could be acquired only by a continuance of the discharge of the sewage prejudicially affecting the estate, at least to some extent, for the period of twenty years."

It is difficult to see any clear line of differentiation between the facts in this case of *Comm.* v. *Yost* and those in *The Coal Company* v. *Sanderson*, 113 Pa. 126. Dr. Yost's actions would be covered by this proposition laid down in the latter case as fully as were those of the Pennsylvania Coal Company. Clark, J., there said that "every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria* . . ." But the only real difference between these cases is to be found in the fact that in the Coal Company's case the court deemed it necessary to lay down a special rule where an adverse decision would have ruined one of the chief industries of the state; while in the present case there was no such public necessity. The court could, therefore, follow more closely the well established principles of the Common Law.

At some future time a case will doubtless arise where the pollution is caused by some large iron or textile manufacturing establishment, whose existence depends on its ability to drain its waste products into a stream which further on in its course contributes to the water supply of some city. It will be of great interest to notice how the courts in such a case will reconcile the doctrines laid down in *The Coal Company* v. *Sanderson*, *McCallum* v. *The Water Company*, and *Commonwealth* v. *Yost*.